

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN J. HALL,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 240640

Wayne Circuit Court

LC No. 01-009788

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Factual Background

Defendant was charged with sexually molesting two family friends, A.A. and P.B., who were twelve and eight years of age respectively at the time of the trial in 2002. The sexual abuse was alleged to have occurred from 1998 until defendant's arrest in 2001. Defendant denied the charges throughout trial. Nevertheless, the jury believed the complainants and found defendant guilty as charged. Defendant subsequently filed a motion for a new trial or for a *Ginther*¹ hearing, on the grounds that he received ineffective assistance of counsel. After the *Ginther* hearing, the trial court denied defendant's motion for a new trial.

II. Ineffective Assistance of Counsel

Defendant raises several arguments on appeal to support his contention that he was denied the effective assistance of counsel. We disagree. Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's factual findings for clear error and its determinations of law de novo. *Id.*

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Effective assistance of counsel is presumed and a defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In order to demonstrate that counsel's performance was constitutionally defective, a defendant must also overcome the strong presumption that his counsel's action or inaction was sound trial strategy. *Id.* at 600.

A. Rape-Shield Statute

Defendant initially asserts that his counsel was ineffective for failing to investigate or introduce evidence that another man had previously molested A.A. According to defendant, this information was relevant because it would have explained A.A.'s age-inappropriate sexual knowledge. Defendant contends that his defense counsel erroneously determined that this evidence was protected under the rape-shield statute, MCL 750.520j.

During the *Ginther* hearing, the defense attorney admitted that he was aware that A.A. was sexually molested in the past. However, he testified that after reviewing the case law he was convinced that the evidence was protected under the rape-shield statute. At the hearing, the trial court agreed with defense counsel's assessment that the evidence would have been inadmissible. The trial court also noted that the evidence would not have affected the trial's outcome.

We find that the trial court's conclusions are supported by the record and the law. The rape-shield statute applies in cases of child sexual abuse and serves to preclude evidence of a victim's prior sexual conduct. *People v Morse*, 231 Mich App 424, 429-430; 586 NW2d 555 (1998). However, if the prior sexual conduct is *sufficiently similar* to the defendant's alleged conduct, such evidence may be admissible to show an alternate source for a child's "unique sexual knowledge." *Id.* at 434, quoting *People v Hill*, 289 Ill App 3d 859, 862-865; 683 NE2d 188 (1997). In such situations, this Court has determined that an *in camera* hearing should be conducted to determine the admissibility of the evidence. *Morse, supra* at 437.

We note that the record presented by defendant at the *Ginther* hearing only provided a sparse description of the underlying facts in the previous case. On this record, we cannot conclude that defense counsel was ineffective for determining that the evidence was inadmissible.

B. Impeachment Evidence

Defendant next claims that his defense counsel was constitutionally ineffective for introducing prejudicial testimony regarding a collateral sexual matter involving defendant. During cross-examination, the defense attorney asked A.A. if he had ever observed defendant having sex with another person. A.A. responded that he saw defendant having sex with a man named Nick. When the defense attorney later attempted to call Nick to rebut this claim, the trial court refused to admit the testimony because it related to a collateral matter. Defendant asserts that his defense counsel should have requested a ruling from the trial court regarding Nick's testimony before he questioned A.A. on that matter.

At the *Ginther* hearing, the defense attorney stated that he elicited this testimony because he intended to call Nick as a witness to deny that he ever had sexual relations with defendant. The defense attorney asserted that he did not believe this testimony constituted impeachment on a collateral matter by extrinsic evidence. The trial court ultimately determined that this evidence did not impact the jury's verdict. In reaching this conclusion, the trial court noted that "[t]his was a case built purely, purely on credibility" because the parties involved knew each other.

Defendant has failed to show that his trial counsel's actions in this instance were not trial strategy. This testimony may have been beneficial to defendant because it offered an alternative explanation for A.A.'s sexual knowledge. Consequently, defendant has failed to establish ineffective assistance of counsel on this ground.

C. Medical Expert

Defendant further maintains that his defense counsel was ineffective for failing to retain a medical expert.

Defense counsel testified at the *Ginther* hearing that he was only informed shortly before the trial began that the prosecution intended to present a medical expert. This expert was expected to testify that A.A.'s "venious [sic] engorgement was consistent with sexual penetration of the anus." After discussing the matter with defendant, defense counsel claimed that he telephoned Dr. James O'Neal upon defendant's recommendation. According to defense counsel, Dr. O'Neal was willing to testify for defendant but indicated that he could not completely rebut the claims of the prosecution's expert. Defense counsel thereafter decided not to call Dr. O'Neal as a witness. The trial court concluded that defense counsel made a strategic decision when he decided that Dr. O'Neal's testimony would not benefit defendant's case.

We agree with the trial court's assessment of this issue. An attorney's decision to present expert witness testimony is presumed to be a matter of trial strategy. *Rockey, supra* at 76. Instead of calling an expert witness, defense counsel attempted to discredit the claims of the prosecution's expert during cross-examination by forcing him to acknowledge that A.A.'s symptoms could have been caused by other benign factors. This Court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

D. Prejudicial Remarks

Defendant also claims that his counsel was ineffective for failing to object to allegedly prejudicial and inappropriate remarks made by the prosecution and the trial court.

1. Trial Court

Defendant notes two instances where the trial court interrupted the prosecution's direct examination of A.A. and stated that the elements were already established.² According to defendant, the trial court was essentially informing the jury that the prosecution had already proven its case. Thus, defendant opines that his counsel's failure to object to these comments and request a curative instruction amounted to ineffective assistance of counsel.

A trial court has wide, although not unfettered, discretion in the matter of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). However, "[a] trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* When evaluating a trial court's conduct, the entire record must be reviewed and the trial court's comments or actions considered in context. *Id.* In this case, the trial court attempted to prevent the prosecution from going into irrelevant areas. Pursuant to MRE 611(a), a trial court has authority to exercise control over the mode of interrogating witnesses to avoid wasting time on unnecessary issues and to protect witnesses from undue embarrassment. We further note that the jury was instructed that it was the only trier of fact in the case. Because the trial court's remarks were proper, defense counsel's failure to object or to request a curative instruction did not amount to ineffective assistance of counsel. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

2. Prosecution

Defendant further asserts that his defense counsel should have objected because the prosecution shifted the burden of proof during closing arguments. Specifically, defendant cites the prosecution's rhetorical questions to the jury regarding how A.A. would have known such graphic sexual details if they did not happen. Defendant suggests that defense counsel's failure to object was particularly egregious given his knowledge of A.A.'s past molestation.

The prosecution bears the burden of proof in a criminal case and may not shift this burden by arguing that the defendant failed in some duty to prove his innocence. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Reviewing the prosecutor's remarks in context, however, we find no merit to defendant's claim that the prosecution shifted the burden of proof. See *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Rather, the prosecution was making reasonable inferences from the evidence presented as it related to its theory of the case. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Thus, any objections to these comments would have been futile. Again, we note that defense counsel is not considered ineffective for failing to advocate a meritless position. *Snider, supra* at 425.

² The prosecution asked A.A. to explain what sperm was to the jury. The trial court quickly interrupted, stating, "[t]hat's not necessary. You've established the elements. I don't think we have to go into that many details." When the prosecution later asked A.A. where defendant's sperm went, the trial court asked if the evidence was relevant and noted that it was not an element of the offense and that all the prosecution had to show was A.A.'s age and the fact that there was penetration.

E. Hearsay Evidence

Defendant additionally alleges that his counsel was ineffective for failing to object when the prosecution questioned Angel Bentley regarding what P.B. told her about defendant. Defense counsel stated at trial that he was not objecting because the testimony fell within the MRE 803A tender-years exception. Ms. Bentley then proceeded to corroborate P.B.'s allegations against defendant concerning masturbation and inappropriate touching.

MRE 803A is an exception to the hearsay rule that allows a child's out of court statement regarding any sexual acts committed against him to be introduced at trial if the statement is used to corroborate the child's testimony. To be admissible, the statement must be spontaneous and cannot be manufactured. MRE 803A(2). However, "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule." MRE 803A.

Defendant argues that P.B.'s statements to Ms. Bentley failed to meet these requirements. Specifically, defendant asserts that Ms. Bentley was not the first person P.B. informed of these alleged acts and that his statements were the result of repeated questioning. After reviewing the record, we find no merit to defendant's contention that these statements were the result of repeated questioning. When A.A. observed P.B. masturbating at the park and told him it was wrong, P.B. told him that defendant said "it's cool for guys to do that." Immediately thereafter, A.A. and P.B.'s sister took him to Ms. Bentley where P.B. repeated this information and informed her that defendant would also "touch him on the butt." Thus, we find that Ms. Bentley's testimony concerning the inappropriate touching fell within the tender-years exception. However, her testimony about the masturbation failed to meet the requirements of MRE 803A because P.B. first informed A.A. of this incident. Nevertheless, because this testimony was merely cumulative to A.A.'s testimony on the matter, we are not convinced that this error affected the trial's outcome. Accordingly, defendant was not denied the effective assistance of counsel on this basis.

F. Cross-Examination of Investigating Officers

Defendant also claims that his counsel was ineffective for failing to question the investigating officers regarding their failure to execute a search warrant on defendant's home. Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has failed to overcome the presumption that his defense counsel made a tactical decision not to call these witnesses. Indeed, the record shows that defense counsel decided to take advantage of the lack of a search warrant when he argued that the prosecution failed to corroborate its case with any physical evidence from defendant's home. While defense counsel's ultimate strategy may have proven unsuccessful in hindsight, this does not mandate a conclusion that he rendered ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

III. Judicial Misconduct

In addition to defendant's claim that the trial court vouched for the credibility of the prosecution's case, he also asserts that the trial court acted improperly when it refused to grant defendant's request to present two doctors as witnesses at the *Ginther* hearing.³ However, defendant's argument on this issue consists of one paragraph with no citation to authority. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority.'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant further asserts that the trial court erred in denying his motion for a new trial. However, defendant failed to include this issue in his statement of questions presented and we decline to consider this argument on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

IV. Cumulative Errors

Defendant ultimately claims that he was denied a fair trial due to the cumulative effect of his counsel's ineffective assistance and the misconduct by both the trial court and the prosecution. Because there were no errors of consequence which combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

³ We note that neither of these physicians testified during the trial.